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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

LINDA AGURS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 510 F. 2d 1249.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1975 (App. B, *infra*). A timely petition

for rehearing with suggestion for rehearing *en banc* was denied on August 6, 1975 (Apps. C and D, *infra*). On August 28, 1975, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to September 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the defense is aware of the probable existence of certain information and makes no request for its production, and the prosecution believes in good faith that the information is immaterial, the prosecutor's nondisclosure of this information constitutes a deprivation of due process of law.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, respondent was convicted of second-degree murder and sentenced to a term of five to twenty years' imprisonment. Respondent neither testified nor produced any evidence in her own behalf at trial. Her defense was based on a claim of self-defense presented solely through

argument of counsel to the jury. With the one exception noted, the facts set forth below are taken from the court of appeals' opinion.

1. On the afternoon of September 24, 1971, decedent James T. Sewell was stabbed to death in a northwest Washington motel. Respondent did not deny that she was responsible for Sewell's death or that she had inflicted the stab wounds. The prosecution introduced evidence tending to show that respondent was a prostitute, and its theory of the case was that Sewell had discovered her searching through his clothes for money when he returned from the bathroom to the motel room that they were occupying; when he attempted to reclaim his funds, respondent stabbed him repeatedly with his knife, which lay among his clothes, and fled taking Sewell's money with her.[1] Sewell was stabbed in the chest and abdomen and slashed about the arms and hands; he subsequently died of these injuries. There were no cuts or wounds on any part of respondent's body.

Respondent's counsel argued that the jury could conclude that she had acted in self-defense. He supported this contention by reference to the presence of a pocket knife in decedent's pocket, his possession of a Bowie knife at the time the couple registered, and the testimony of one witness that, when discovered by motel employees, Sewell lay atop respondent

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[1] Sewell and respondent had registered for a room as man and wife; motel employees observed that Sewell was then wearing a Bowie knife in a sheath.

as they struggled for the knife. The jury nonetheless found appellant guilty of second degree murder.

During pretrial interviews of witnesses, defense counsel became aware of the possibility that Sewell might have been previously arrested for and convicted of violent crimes. Before pursuing this line of inquiry, however, he ascertained from respondent that she knew of no violent acts in Sewell's past. Her attorney believed that, under then-existing law, a decedent's prior convictions for violent crimes were inadmissible to prove self-defense unless the person accused of the crime had actual knowledge of them at the time of the homicide. Upon obtaining corroboration of his understanding of the law from other attorneys, respondent's attorney concluded that any further search for decedent's criminal record would be pointless. Defense counsel neither subpoenaed nor requested that the prosecution produce decedent's criminal record. No testimony was introduced at trial concerning Sewell's past arrests or convictions for violent crime. Sewell had in fact been convicted in 1963 for assault and carrying a dangerous weapon and in 1971 for carrying a dangerous weapon; both incidents involved knives.

The prosecution shared defense counsel's belief that, under precedents governing at the time of trial, the evidence of decedent's prior convictions, because not known to the respondent, would not have been admissible on her behalf (Transcript of July 24, 1973 Hearing at 11).

Approximately three months after the completion of respondent's trial, the United States Court of Appeals for the District of Columbia Circuit held, in *United States* v. *Burks*, 470 F. 2d 432, that, irrespective of the defendant's knowledge thereof, evidence of past violent acts by a decedent is admissible in a homicide case in which a claim of self-defense is raised, because of its relevance to determining who was the aggressor.[2] *Id.* at 434, n.4. Upon being apprised of this decision, respondent's attorney approached the United States Attorney's office to ascertain whether or not Sewell had had a criminal record. A search of the prosecution's files revealed the information concerning Sewell's convictions. Defense counsel thereupon filed a motion for a new trial on the basis of newly discovered evidence. The trial court denied the motion, finding that admission of decedent's record would not have made any difference to the jury's verdict.

2. The court of appeals reversed respondent's conviction and remanded the case for a new trial, holding that the prosecution's failure to furnish the defendant with the past criminal record of the deceased

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[2] The general rule elsewhere appears to be that evidence of specific conduct of the decedent involving assaults on persons other than the defendant is not admissible unless known to the defendant. *Hayes* v. *United States*, 367 F.2d 216, 223 (C.A. 10); see 2 Wigmore, *Evidence* §§ 246, 248 (3d ed. 1940). This issue, which was an essential predicate for the decision below, does not appear to be of sufficient importance to merit consideration by this Court, and we accordingly are not presenting it for review.

on its own initiative constituted a denial of due process of law under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. Although it recognized that "[n]o clear consensus exists among the courts on the question of whether, in the absence of prosecutorial misconduct, a defense request is necessary to trigger the prosecution's duty to reveal possibly exculpatory information in its possession" (App. A, *infra*, p. 9a), the court of appeals nevertheless held that the evidence not disclosed by the prosecution was sufficiently material to the question of respondent's guilt or innocence to overcome the absence of prosecutorial culpability and any lack of defense diligence.

3. The government's petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals. Four active judges, joined by Senior Judge Danaher, a member of the original panel, filed a statement disagreeing with the panel opinion and expressing the belief that the case should have been reheard by the full court [3] (App. D, *infra*, pp. 20a-22a).

REASONS FOR GRANTING THE WRIT

In holding that the prosecution's failure to reveal decedent's prior criminal record to defense counsel constituted reversible error even though there had been no defense request for the information, the court

[3] Judge Leventhal filed a separate statement explaining his disagreement with the panel opinion and his reasons for voting against *en banc* consideration. App. D, *infra*, pp. 22a-24a.

of appeals has rendered a decision on an important question of constitutional law that conflicts with decisions of this Court and of several courts of appeals. Moreover, the decision below is of great practical significance because of its broad implications for the procedures that the prosecution must employ in handling all criminal cases. The court of appeals' virtual elimination of the requirement that there be some meaningful defense request for production of information will result in the imposition of an exceptionally onerous burden on good faith prosecution efforts to comply with its responsibilities under *Brady*. Because of the uncertainties created by this decision, guidance from this Court is needed to enable the government to formulate standards for the training and instruction of its attorneys in their responsibilities to disclose evidence to criminal defendants.

1. The government's failure to disclose exculpatory evidence to a criminal defendant and to prevent submission to the jury of evidence known to be false constitutes a denial of due process of law when the evidence itself is material to the jury's determination. *Pyle* v. *Kansas*, 317 U.S. 213; see *Giglio* v. *United States*, 405 U.S. 150. Even if no false evidence is submitted to the jury, the prosecutor's wrongful failure to disclose exculpatory evidence to the defense may violate due process requirements. *Brady* v. *Maryland*, 373 U.S. 83. Twice previously this Court has indicated that the culpability of the prosecution's nondisclosure of evidence is dependent upon the pres-

ence or absence of a prior defense production request. In *Brady* the Court held that the suppression by the prosecution of evidence favorable to the defendant, despite his request for its production, constitutes a denial of due process of law if the evidence withheld is material either to the guilt or punishment of the accused. It was this withholding of exculpatory evidence *demanded by the accused* which cast the prosecutor in the role of an architect of an unjust proceeding and constituted error of constitutional dimension.

As reiterated in *Moore* v. *Illinois*, 408 U.S. 786, 794-795, the essence of the holding in *Brady* is the prosecution's suppression of material exculpatory evidence in the face of a defense production request. The standards by which the government's conduct is to be measured for possible due process violations are (a) whether the evidence was suppressed by the prosecution after a defense request, (b) its favorable character for the defense, and (c) its materiality.

In the instant case, by contrast, the court of appeals did not adhere to the *Brady-Moore* formulation of prosecutorial misconduct in ignoring a specific defense production request as the ground for overturning the conviction. Instead, it held that the possibly exculpatory nature of the undisclosed evidence, considered objectively and without regard to improper governmental behavior, was a much more significant factor in determining whether respondent had been denied a fair trial (App. A, *infra*, p. 10a). While

acknowledging in passing that there was no request, the court of appeals' opinion shows that it gave almost no weight to that factor, even though the attorneys' shared reasonable belief that the evidence would be inadmissible negates any inference of bad faith nondisclosure.

Nothing in the *Brady* rationale justifies the court of appeals' complete disregard of the customary requirement of a meaningful defense request as a predicate to transformation of the prosecution's failure to volunteer evidence such as decedent's criminal record into a denial of due process of law. The exculpatory nature of the undisclosed evidence is of course a necessary prerequisite to the award of a new trial; but it is not sufficeint of itself to invoke the *Brady* doctrine, because it does not demonstrate the necessary element of improper prosecutorial behavior. Furthermore, the materiality requirement must always be satisfied, but nothing in this Court's explication of *Brady* suggests that a finding of materiality renders the other elements unnecessary to a finding of denial of a fair trial.[4] The court of appeals' effective disregard of the prior request criterion is therefore inconsistent with this Court's explication of the due process requirement.

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[4] Of course, newly discovered exculpatory evidence that casts serious doubt upon the validity of the guilty verdict may afford grounds for awarding a new trial under Rule 33, Fed. R. Crim. P., even though there has been no violation of due process requirements. But the district court concluded that the evidence here in question did not satisfy Rule 33 standards, and the court of appeals did not overturn that conclusion.

We do not here suggest that the absence of a defense request will always automatically foreclose a *Brady* claim. A deliberate governmental decision to suppress information of central importance to the defense, made for the specific purpose of deception, or even a failure to disclose exculpatory evidence whose high value to the defense could not escape the prosecutor's attention, may violate the prosecution's obligation to ensure, *sua sponte*, that the accused is not wrongfully convicted. See *United States* v. *Keogh*, 391 F. 2d 138, 146-147 (C.A. 2); *Evans* v. *Janing*, 489 F. 2d 470 (C.A. 8). Except for these extraordinary situations, however, the *Brady* rule does not require the prosecution to search its files *sua sponte* for all information possibly helpful to the defense. *Moore* v. *Illinois*, *supra*, 408 U.S. at 795. Rather, it assures the defendant that he will not be denied access on request to exculpatory evidence known to the government but unknown to him. *United States* v. *Ruggiero*, 472 F. 2d 599, 604 (C.A. 2), certiorari denied, 412 U.S. 939.

Thus, the presence or absence of a defense production request plays a crucial role in determining whether the prosecution's handling of evidence has denied the accused due process of law. A production request puts the prosecution on notice[5] that the de-

[5] Since the function of the defense production request is to inform the prosecution of the evidence needed to prepare for trial, the request must be narrowly and meaningfully drafted. A general request for all exculpatory information should be viewed as no better than no request at all.

fense considers certain exculpatory evidence of importance at the forthcoming trial. The request thereby changes the standards applicable to the government's behavior (see *United States* v. *Keogh*, *supra*), placing the prosecutor under a duty to determine whether the government's files contain exculpatory information of the kind requested, and failure to use due care in identifying, assembling, and disclosing such evidence may constitute prosecutorial misconduct.

2. In considering the materiality of the undisclosed evidence, the court of appeals found that respondent's conviction must be reversed if the undisclosed evidence might have led the jury to entertain a reasonable doubt as to her guilt (App. A, *infra*, pp. 10a-11a).[6] That is the lowest possible standard of materiality under the *Brady* rule, one that usually is applied in cases of deliberate prosecutorial misconduct. *United States* v. *Keogh*, *supra*. Manifestly, however, the element of improper response to a de-

[6] *Barbee* v. *Warden*, 331 F.2d 842 (C.A. 4), cited as justification for the emphasis on materiality, was a drastically different case. It was there held that the prosecution denied the defendant a fair trial by marking his gun for identification and questioning eyewitnesses about it without disclosing to defense counsel or the court that police ballistics tests conclusively proved that the weapon was not involved in the crime. In *Levin* v. *Katzenbach*, 363 F.2d 287 (C.A.D.C.), the defendant's conviction was reversed for newly discovered evidence under a low materiality standard, even though there was no suggestion of prosecutorial misconduct. However, the decision in *Moore* v. *Illinois*, *supra*, seriously undermines its precedential value.

fense production request should substantially reduce the showing necessary to obtain a new trial. See *Brady* v. *Maryland*, *supra*, 373 U.S. at 87-88; *United States* v. *Keogh*, *supra*, 391 F. 2d at 147-148. By the same token, where the prosecution's nondisclosure evidences no malice or bad faith, there has been no defense request, and the evidence is not so unexpected or obscure that the defense could not have framed a meaningful request, a much higher materiality threshold should be imposed in order to award the defendant a new trial. That standard, we suggest, should be the same as that normally required to obtain a new trial on grounds of newly discovered evidence under Rule 33, Fed. R. Crim. P.

Here, the defense was aware of the underlying facts and could easily have obtained the exculpatory information itself by subpoena or drafted an appropriate production request; accordingly, the government's unprompted failure to disclose the decedent's criminal history cannot constitute a denial of respondent's constitutional rights under this Court's decisions in *Moore* and *Brady*. *United States* v. *Ruggiero*, *supra*; *United States* v. *Brawer*, 367 F. Supp. 156 (S.D.N.Y.), affirmed, 496 F. 2d 703 (C.A. 2); *Levin* v. *Katzenbach*, *supra*, 363 F. 2d at 292 (Burger, J., dissenting).

In *Brady* and *Moore*, this Court discussed the necessity of a defense production request without explicating in any depth the effect of its presence or absence on the standards by which the materiality of the evidence discovered after trial should be assessed.

We submit that the instant case presents an appropriate opportunity for the establishment of such standards.

3. The court of appeals' reduction of the defense request requirement to a virtual irrelevancy and its adoption of a relaxed standard of materiality in the absence of prosecutorial misconduct conflict with decisions of at least four other circuits. *United States* v. *Baxter*, 492 F. 2d 150 (C.A. 9), certiorari denied, 416 U.S. 940; *United States* v. *Schembari*, 484 F. 2d 931 (C.A. 4); *United States* v. *Rosner*, 516 F. 2d 269 (C.A. 2); *United States* v. *Keogh*, *supra*; *Shuler* v. *Wainwright*, 491 F. 2d 1213 (C.A. 5). That conflict should be resolved by this Court.

4. The decision below has potentially revolutionary implications for the standards of conduct governing the behavior of federal government prosecutors in almost all criminal cases. The court of appeals has effectively required the prosecutor to make an accurate pretrial analysis, at the risk of reversal, of the possible utility of all information in his files to the defendant at the forthcoming trial, without the guidance and perspective provided by a meaningful production request by the defense. If the course of the trial should thereafter reveal that evidence not selected for disclosure might have been material to the jury's determination, the resulting verdict becomes subject to successful attack. The costs, delay and uncertainty of this procedure are evident. Given the unpredictable nature of trial proceedings and the obvious institutional interests in

avoiding retrials, the operational effect of the court of appeals' ruling may be a dramatic expansion of discovery in criminal cases, thereby significantly altering the traditional character of criminal trials.[7] See *Giles* v. *Maryland*, 386 U.S. 66, 119 (Harlan, J., dissenting).

In any event, right or wrong, the ruling below creates substantial confusion about the standards properly utilized by United States Attorneys in instructing their subordinates of their *Brady* responsibilities and requires clarification by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JOHN F. COONEY,
Assistant to the Solicitor General.

SEPTEMBER 1975.

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[7] If a mere demonstration that the prosecutor's files contained evidence that might have been material to the defense is sufficient, even in the absence of a defense request, to require a new trial, the prudent course in most cases would likely be simply to throw open those files to the defense prior to trial, even though such a course would facilitate the fabrication of spurious defenses and give rise to the other evils that have caused discovery to be limited in criminal proceedings. Otherwise, the risk that some evidence not so disclosed will later be deemed material is unacceptably high.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 72-2072, 73-1956 and 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT
(two cases)

Argued Nov. 25, 1974

Decided April 3, 1975

Appeals from the United States District Court for the District of Columbia (D.C. Criminal 2081-71).

Cornish F. Hitchcock,* with whom Sherman L. Cohn, Washington, D.C. (appointed by this Court), and Steven M. Pavsner,* were on the brief, for appellant. Edwin J. Bradley, Washington, D.C. (appointed by this Court), also entered an appearance for appellant.

Gerald F. Treanor, Jr., Asst. U.S. Atty., with whom Earl J. Silbert, U.S. Atty., John A. Terry and James

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* Entered appearances as student counsel pursuant to Rule 20 of the General Rules of this Court.

F. McMullin, Asst. U.S. Attys., were on the brief for appellee. Harold H. Titus, Jr., U.S. Atty. at the time the record was filed and John O'B Clarke, Jr., Asst. U.S. Atty., also entered appearances for appellee in No. 72-2072.

Before BAZELON, Chief Judge, DANAHER, Senior Circuit Judge, and Justice,**, United States District Judge for the Eastern District of Texas.

Opinion for the Court filed by District Judge JUSTICE.

JUSTICE, District Judge:

The appellant, Linda Agurs, appeals from her conviction for second-degree murder,[1] for which she was sentenced to a term of five to twenty years' imprisonment. Apart form the issue of self-defense, there was little disagreement between the parties at trial with respect to the facts.

James T. Sewell met his estranged wife for lunch on September 24, 1971. They had planned to travel to New York together that evening, but quarreled during their meeting and parted. Mrs. Sewell testified that her husband boarded a bus at about 2:45 in the afternoon, and that he was carrying about $360.00 in his pocket.

Sewell and the appellant arrived together at a motel in Northwest Washington about 4:30 on the same afternoon. A motel employee testified that he observed that Sewell was wearing a Bowie knife in a sheath.

** Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] The offense is defined by 22 D.C.Code § 2403.

The two registered as man and wife and departed the lobby for their room. Approximately a quarter hour later, the desk clerk and two other employees heard a woman's screams emenating from the room occupied by Sewell and the appellant. They forced their way into the room and discovered the two on the bed struggling with a knife—a Bowie knife, as it was later ascertained. The employees separated them and summoned an ambulance for Sewell, who was bleeding. Appellant left the building at the time, but surrendered voluntarily to the police the next day. In the meantime, Sewell died from stab wounds inflicted during the struggle. The most serious wounds were in Sewell's chest and abdomen, but his arms and hands also exhibited cuts and slashes suggesting an attempt to repel an attack.

The appellant was indicted for second-degree murder. At the trial, it was the theory of the prosecution that the appellant was a prostitute whom Sewell had encountered in the course of the afternoon, and that she brought him to the motel in the course of plying her trade. On this theory, the appellant, dissatisfied with the amount Sewell paid her for her services, rummaged through his clothing while he was in a bathroom down a hall from their room and removed the money she found there. Sewell, returning, caught her in the act and attempted to retrieve his money, whereupon she stabbed him with the knife, which also lay among his clothes. In support of this scenario, the prosecution cited testimony that a motel employee had seen the appellant check into the motel with men

on other occasions. In addition, the witnesses to the struggle agreed that the appellant was fully dressed but that Sewell was clad only in his trousers, and that the knife was pointed at his chest during the part of the struggle that they observed. There was money neither in Sewell's wallet, which was found in the motel room after the incident, nor in his pockets, which were searched at the morgue. Finally, the prosecution stress the testimony of the nurse who examined the appellant the day after the incident; she found no cuts or wounds on any part of the appellant's body.

Appellant's attorney advanced the contention that she had inflicted the stab wounds in self-defense. He elicited testimony from the motel's desk clerk to the effect that Mrs. Sewell had appeared at the motel after the incident and told him that Sewell "would use a knife." Mrs. Sewell denied having made the statement. Counsel for appellant also noted the presence of a pocket knife in Sewell's pocket when he was taken to the morgue, emphasized the uncontradicted evidence that *Sewell* had the Bowie knife at the time the pair checked in, and developed from one of the witnesses testimony that Sewell lay atop the appellant during the struggle.

Defense counsel had become aware, during pretrial interviews with witnesses, of the possibility that Sewell might have been arrested or convicted in the past for violent crimes. Before investigating Sewell's arrest and conviction record, however, he asked the appellant whether she knew of any violent episodes in

Sewell's past; she knew of none. The attorney believed that a decedent's prior convictions for violent crimes were inadmissible to prove self-defense unless the person accused of the homicide knew of them. To reassure himself, he consulted an older lawyer who had some experience with criminal law; the older lawyer advised him that this view of the law was correct. He thus concluded that a search for Sewell's prior record would be a waste of time. Counsel also believed, he testified later, that the prosecution would advise him if they knew that Sewell had a criminal record. In any event, none of the evidence presented to the jury at trial suggested that Sewell had ever been arrested for or convicted of a crime of violence.

A month after the appellant was sentenced, defense counsel received a copy of this court's opinion in United States v. Burks.[2] The *Burks* opinion noted that this court has "long recognized" that evidence of past violent acts by a deceased is admissible in a homicide case in which the issue of self-defense is raised because "[s]uch evidence is relevant on the issue of who was the aggressor. . . ."[3] A footnote to that observation admonished that "[i]t bears emphasis . . . that as to the issue of who was the aggressor it is irrelevant that the defendant did not know about the deceased's character."[4] On learning of this long-recognized rule, of which he had been entirely ignor-

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[2] 152 U.S.App.D.C. 284, 470 F.2d 432 (1972).

[3] *Id.* at 434.

[4] *Id.* at 434 n. 4.

ant, counsel became alarmed and immediately sought to discover whether or not Sewell did, in fact, have a criminal record. He went to the United States Attorney's office and, finding the Assistant who had prosecuted the appellant absent, spoke with one of the other Assistants. The Assistant took appellant's counsel to a "closed files" room and located the file concerning the prosecution of the appellant. There, close to the front of the folder they found a paper disclosing that Sewell had been convicted in 1963 for assault and carrying a dangerous weapon and in 1971 for carrying a dangerous weapon. The weapon, in each instance had been a knife.

Defense counsel immediately filed a motion for new trial on the ground of newly discovered evidence. The trial judge denied the motion, expressing skepticism that "a CDW conviction and a '63 ADW conviction" would have made any difference in the jury's conclusions. Being convinced that his misunderstanding of the law had seriously prejudiced the appellant's plea of self-defense, her counsel later requested to withdraw, in order that the issue of his ineffectiveness could be raised by appellant's attorney on appeal.

Appellant asserts that her conviction should be reversed on three grounds. First, she contends that the trial judge erred in denying her motion for new trial. Second, she urges that her defense counsel's failure to bring Sewell's record of convictions before the jury deprived her of her sixth amendment right to the effective assistance of counsel. Finally, she argues that the prosecution denied her due process of law

under the doctrine of Brady v. Maryland,[5] which prohibits "suppression by the prosecution of evidence favorable to an accused."[6]

[1] It is unquestioned that a prosecutor's deliberate failure to supply defense counsel with information that tends to exculpate the accused constitutes prosecutorial misconduct meriting reversal of a conviction.[7] Neither party to this appeal has any quarrel with this principle. Nor can there now be any disagreement with the rule of *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[8] Appellee's first response is that the prosecution was not required to inform appellant's attorney of Sewell's record in the absence of a request for such information, and second, that the information was in

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[5] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[6] *Id.* at 87, 83 S.Ct. at 1196.

[7] *See, e.g.*, Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); United States ex rel. Thompson v. Dye, 221 F.2d 763 (3d Cir.), cert. denied, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955); United States ex rel. Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), cert. denied, 345 U.S. 904, 73 S.Ct. 639, 97 L.Ed. 1341 (1953).

[8] 373 U.S. at 87, 83 S.Ct. at 1196, *accord* Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

any event of such small importance in the context of the case that failure to reveal it had no effect on the verdict of the jury.[9]

At the outset, it should be observed that defense counsel's attempts to request relevant information from the United States Attorney can not categorically be characterized as lacking in diligence. The record reveals that the attorney for appellant appeared at a calendar call shortly after he had been appointed to represent her and indicated that he wished to place a stipulation regarding discovery on the record. The attorneys had encountered no difficulties in agreeing upon discovery procedures and the scope of discovery up to that point; and the trial judge, therefore, suggested to defense counsel that he return to court for formal discovery proceedings only in the event that he experienced difficulty in obtaining the materials that he desired from the office of the United States Attorney. Further, the trial judge commented that, in his experience, the United States Attorney's office always provided defense counsel with all discoverable material. Defense counsel thereupon assented to the trial judge's suggestion.

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[9] The United States does not contend that the prosecution had no knowledge of Sewell's prior record, and indeed such a contention would almost certainly be unavailing in view of the fact, already mentioned, that the information, when finally discovered by the appellant's counsel, was in a folder maintained by the office of the United States Attorney. *See* Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). This is not to say that the prosecution engaged in deliberate suppression.

Even supposing that defense counsel's trusting attitude toward the prosecution, together with his failure to undertake a search for Sewell's prior criminal record, demonstrates some neglect of his duty to his client, that conclusion does not foreclose further inquiry into the possibility of unfairness to the accused. No clear consensus exists among the courts on the question of whether, in the absence of prosecutorial misconduct, a defense request is necessary to trigger the prosecution's duty to reveal possibly exculpatory information in its possession.[10] Rather than attempting to formulate universal rules, most courts faced with *Brady* challenges to convictions have examined various factors in the cases actually before them—including the diligence of defense counsel, the presence or absence of prosecutorial culpability, and the materiality of the undisclosed evidence—in arriving at their conclusions.[11] When defense counsel has been less than industrious, the prosecution guideless, and the evidence in question of doubtful materiality, the courts

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[10] Among cases that have imposed such a duty in the absence of a request are the following: United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Simms v. Cupp. 354 F.Supp. 698 (D.Or. 1972); Clements v. Coiner, 299 F.Supp. 752 (S.D.W.Va. 1969). *But see* United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968), in which Judge Friendly wrote that the court "cannot agree with petitioner that where there has not been deliberate suppression . . . the absence of a request is irrelevant."

[11] *See* United States v. Mayershon, 452 F.2d 521 (2d Cir. 1971).

have found no due process violation requiring reversal of the conviction because of the mere fact that the prosecution had access to evidence that the defense would have desired.[12] On the other hand, a prosecutor's willful failure to disclose evidence that is clearly material upon defense counsel's timely request has always been held to constitute reversible error. The difficut cases, such as the case before the court, fall between two extremes.

[2] The materiality of undisclosed evidence is a much more significant factor than prosecutorial misconduct or defense negligence. Thus, nondisclosure of evidence that would have been of central importance to the defense had it been available will void a conviction even though the prosecution may have acted in good faith or defense counsel may have failed in his duty of diligence.[13] In Barbee v. Warden,[14] the Fourth Circuit reasoned that "[i]n gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel." In Levin v. Katzenbach,[15] this court held that a conviction obtained while defense counsel is ignorant of important potentially exculpatory evidence cannot be upheld merely because "more able, diligent, or fortunate counsel might possibly have come upon the evidence on his own." [16] Accordingly, the case was remanded for a determination of whether the undisclosed evidence, if brought to the attention of the jury, "might have led the jury to entertain a reasonable doubt about appellant's guilt." [17] Thus, we are constrained to consider the second point advanced by the appellee—that the evidence of Sewell's prior convictions is insufficiently material for its nondisclosure to require reversal of the appellant's conviction.

Appellant did not at any time deny that she had been responsible for Sewell's death or that she wounded him with his Bowie knife. Her sole defense was her claim that he had initially attacked her with the knife, and that her actions had all been directed toward saving her own life. In a similar situation the Supreme Court suggested that a prosecutor's failure to disclose that there was an open penknife in the deceased's pocket when his body arrived at the morgue would constitute a denial of due process, if the knife would be admissible under the trial court's customary

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[12] *See, e.g.*, United States v. Soblen, 301 F.2d 236 (2d Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962); United States v. Fabric Garment Co., 262 F.2d 631 (2d Cir. 1958), cert. denied, 359 U.S. 989, 79 S.Ct. 1117, 3 L.Ed.2d 978 (1959).

[13] *E.g.*, United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Levin v. Katzenbach, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966); United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Evans v. Kropp, 254 F.Supp. 218 (E.D.Mich. 1966).

[14] 331 F.2d 842, 846 (4th Cir. 1964).

[15] 124 U.S.App.D.C. 158, 363 F.2d 287 (1966).

[16] *Id.* at 162, 363 F.2d at 291.

[17] *Id. see* Levin v. Clark, 133 U.S.App.D.C. 6, 408 F.2d 1209 (1967).

rules of evidence.[18] In a murder case in which the defendant relied on self-defense, the Oregon Court of Appeals held that the prosecution's nondisclosure of a deceased's past violent history denied him due process of law.[19]

[3] Moreover, Sewell's prior convictions for crimes involving knives seem at least as crucial as non-disclosed evidence in other cases which led to reversals: *e.g.*, the fact that a prosecution witness has been granted immunity in exchange for his testimony;[20] the statement of a witness that he had no memory of certain aspects of the transaction;[21] or the circumstance that a prior romantic entanglement existed between a homicide victim and the decedent's wife.[22] In an analogous situation, the Supreme Court held that suppression of evidence of the sexual escapades of a complaining witness in a rape case in which the issue was whether or not an act of intercourse was consensual denied the accused a fair trial, although the suppression was unintentional on the part of the prosecutor.[23] Further, in United States v. Burks,[24]

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[18] Griffin v. United States, 336 U.S. 704, 69 S.Ct. 814, 93 L.Ed. 993 (1949).

[19] State v. Williams, 500 P.2d 722 (Ct.App.Or. 1972).

[20] *See* Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[21] *See* Levin v. Clark, 133 U.S.App.D.C. 6, 408 F.2d 1209 (1967).

[22] *See* Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).

[23] Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

[24] 152 U.S.App.D.C. 284, 470 F.2d 432 (1972).

this court reversed the conviction of a defendant found guilty of murder because the trial court refused to admit evidence of the exact nature of that denied the appellant herein. We there held that "the evidence he sought to introduce was vital to his defense."

The appellee argues that the convictions are merely cumulative of other evidence that did reach the jury from which it could be inferred that Sewell had a propensity to carry knives and use them aggressively. In particular, it cites the motel employee's testimony that Mrs. Sewell had told him that Sewell "would use a knife", the desk clerk's observation that Sewell was wearing a knife at the time the couple registered, and the testimony of one witness that Sewell was on top of the appellant during the struggle. Some of this evidence was weakened significantly by conflicting evidence. Mrs. Sewell, for example, testified that she never made the statement that the motel employee attributed to her. But the jury would not have been forced to resort to inferences from conflicting or ambiguous evidence in order to believe that Sewell had a proclivity for carrying and using knives if his past history had been revealed to them. The records of his convictions upon pleas of guilty to two knife-related offenses would have constituted undeniable evidence of that trait.[25]

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[25] *See generally id.* at 289, 470 F.2d at 437 ("Nor is it significant that the appellant had already brought some attention to the child killing [by the deceased] by mentioning it when he testified on his own behalf. While the jury might

Accordingly, we hold that the evidence withheld by the prosecution in this case is sufficiently material and important to the question of the appellant's guilt or innocence [26] as to overcome any lack of diligence on the part of appellant's trial counsel. This decision renders unnecessary any consideration of the appellant's arguments concerning the trial court's denial of her motion for new trial and the alleged ineffectiveness of her trial counsel.

Reversed and remanded.

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have discredited his testimony on this issue, it would have had virtually no choice but to believe [the deceased's wife] if she had taken the stand and testified that [the deceased] had killed their son.")

[26] There is some force to the appellant's argument that even if the evidence of Sewell's history might not have affected the jury's verdict as to guilt or innocence, it might have influenced the jury to consider a verdict finding the appellant guilty of the lesser included offense of manslaughter. *See* United States v. Burks, 152 U.S.App.D.C. 284, 470 F.2d 432 (1972).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Criminal 2081-71

[Filed Apr. 3, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-2072

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 73-1956

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, DANAHER, Senior Circuit Judge and JUSTICE,* United States District Judge for the Eastern District of Texas

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these causes is hereby reversed and these cases are remanded to the District Court, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: April 3, 1975
Opinion for the Court filed by District Judge Justice

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Criminal 2081-71

[Filed Aug. 6, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-2072

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

Before: BAZELON, Chief Judge, DANAHER, Senior Circuit Judge and JUSTICE,* United States District Judge for the Eastern District of Texas

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

ORDER

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Senior Circuit Judge Danaher would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Criminal 2081-71

[Filed Aug. 6, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-2072

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

Before: BAZELON, Chief Judge, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges

ORDER

Appellee's suggestion for rehearing *en banc* having been transmitted to the full Court and there not be-

ing a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Statement of *Circuit Judge* Leventhal as to why he voted against rehearing *en banc* attached.

Statement of *Circuit Judges* Tamm, MacKinnon, Robb and Wilkey, joined by *Senior Circuit Judge* Danaher, as to why they voted to grant the suggestion for rehearing *en banc* attached.

Statement of Circuit Judges Tamm, MacKinnon, Robb, and Wilkey as to why they voted to grant the suggestion for rehearing *en banc*, and now joined by Senior Circuit Judge Danaher, who as one of the original panel had voted that the panel decision be reheard.

We are of the opinion that this case should have been reheard by the full court, inasmuch as the two principal underpinnings of the panel opinion are of extreme doubtful validity.

First, in spite of the fact that defense counsel was "aware . . . of the possibility that Sewell [the decedent] might have been arrested or convicted in the

past for a violent crime," defense counsel never requested the Government to produce decedent's record. The panel's holding that the Government was still required under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose to the defense a decedent's prior convictions for simple assault and carrying a dangerous weapon, three and twelve years prior to the offense, is of dubious validity in light of the Supreme Court's more recent statement in *Moore* v. *Illinois*, 408 U.S. 786 (1972), that "[t]he heart of the holding of *Brady* is the prosecution's suppression of evidence, *in the face of a defense production request*, where the evidence is favorable to the accused and is material either to guilt or punishment." 408 U.S. 794 (emphasis added). Both the prosecutor and the defense counsel here believed that the prior convictions of the decedent were inadmissible, so even if the Government has spontaneously informed defense counsel of them, defense counsel would not have sought to have introduced them at trial.

Second, both counsel were probably correct; the panel's ruling that "evidence of past violent *acts* by a deceased is admissible in a homicide case in which the issue of self-defense is raised" (emphasis supplied) is erroneous and a substantial departure from the accepted rule. "The general rule is that the general reputation of a decedent may be shown, but that *specific acts* against other persons than the defendant, which are remote in point of time, are not admissible *when* they are *not known* by the defendant." *Hayes* v. *United States*, 367 F.2d 216, 223 (10th Cir. 1966)

(emphasis supplied). The fact situation, as described in the panel opinion, indicates that the decedent and the accused had the sparsest of acquaintanceship prior to their rendezvous in the motel room. There was never a claim by the accused that she knew of any violent character or acts of the decedent, for, in spite of the inference to be drawn from the language in the panel opinion, the appellant at no time took the stand. The whole theory of self-defense was conjured by her trial attorney in argument.

This Circuit has not adopted the two principles of law relied on in the panel opinion to reverse this conviction for second degree murder. If we are to adopt such principles, which we believe are in contrast to long-standing rules in this and other Circuits, it should be on a hearing *en banc*.

Statement of Circuit Judge Leventhal as to why he voted against rehearing en banc.

My vote against rehearing is not necessarily an approval of the panel's judgment or opinion. But there is a limit to the number of cases we can take en banc.

I am certain that the doctrine of *Brady*[1] is confined to cases where there has been a request by the defense, even though that has thus far been requisite by the Supreme Court.[2] Certainly I agree with Judge Friendly that the making of a request is ordinarily

[1] Brady v. Maryland, 373 U.S. 83.

[2] Moore v. Illinois, 408 U.S. 786 at 794 (1972).

not "irrelevant."[3] Leaning too heavily on the request, however, may only serve to throw the inquiry into whether lack of request negates effective assistance of defense counsel. This court is not confined on direct appeal to reversal for denial of constitutional right, as is the case when it is considering collateral attack or when the Supreme Court reviews a state conviction. On direct appeal, it may reverse in the interest of justice, 28 U.S.C. § 2106, because it is concerned that the omission of defense counsel has led to a miscarriage of justice even though it cannot be labeled constitutional error.[4] *Dyer* v. *United States*, 126 U.S.App.D.C. 312, 379 F.2d 89 (1967). In my view, the decision might better have been articulated in these terms rather than constitutional concepts.

As to merits or importance of the evidence issue, there is learning in this court that, on the issue of whether the decedent was the aggressor, information about the deceased can be brought out even though it was not known to defendant—whether by evidence of the character or belligerency of the deceased (allowed as an extension of the rule admitting threats of deceased that were not communicated to defendant[5])

[3] U.S. v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968).

[4] Bruce v. U.S., 126 U.S.App.D.C. 336, 340, 379 F.2d 113, 117 (1967); Dyer v. U.S. 126 U.S.App.D.C. 312, 379 F.2d 89 (1967).

[5] Evans v. U.S., 107 U.S.App.D.C. 324, 277 F.2d 354 (1960).

or by acts of the deceased.[6] The issue then becomes one of remoteness of the deceased's prior convictions.

This case is certainly not a strong one even for admissibility of the acts involved—since the assault conviction was in 1963, and the 1971 conviction for carrying a dangerous weapon was cumulative of the admitted undisputed evidence that deceased was wearing a bowie knife. Still, the conviction was one thing the jury might take into account as bearing on both the self-defense issue and the degree of the crime. The prosecution's omission here may not be as weighty as other omissions that have led to reversals in the absence of a discovery request, but the questions are one of degree.

And so, while I don't necessarily agree with the panel's result, its action in ordering a new trial does not seem to me such a departure from doctrine and acceptable standards of judicial administration as to require en banc consideration.

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[6] U.S. v. Burks, 152 U.S.App.D.C. 284, 286, 470 F.2d 432, 434 (1972).

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